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No. 94-797

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In The

Supreme Court of the United States

October Term, 1994

LUCIOUS ABRAMS, JR., REV. G.L. AVERY, WILLIAM GARY CHAMBERS, SR., and KAREN WATSON,

Appellants,

v.

DAVIDA JOHNSON, et al.,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia (Three Judge Court)

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether plaintiffs, who suffered no dilution of their voting strength or other "individual harm," have standing to challenge Georgia's congressional redistricting, or are entitled to any remedy?

2. Whether plaintiffs satisfied the threshold test of *Shaw v. Reno* of proving that Georgia's Eleventh Congressional District was so bizarre or irrational on its face that it could only be understood as an effort to segregate voters into separate districts on the basis of race?

3. Whether the three judge court erred in holding that the racial community of interest shared by black citizens in Georgia was barred from constitutional recognition, and that the consideration of race as a substantial or motivating factor in congressional redistricting, without regard to district shape, automatically triggers strict constitutional scrutiny?

4. Whether the court below erred in reviewing the objection of the Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the state's proposed congressional redistricting and in concluding that the objection was improper, and that as a consequence the state did not have a compelling interest in complying with the objection?

5. Whether the lower court erred in ruling that the state did not have a compelling interest in complying with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, or in remedying the effects of past discrimination in congressional redistricting?

QUESTIONS PRESENTED – Continued

6. Whether, assuming a compelling or other requisite state interest, the lower court erred in holding that the state's plan was not narrowly tailored?

PARTIES TO THE PROCEEDING

The appellants are Lucious Abrams, Jr., Rev. G.L. Avery, William Gary Chambers, Sr., and Karen Watson. The appellees are Davida Johnson, Pam Burke, Henry Zittrouer, George L. DeLoach, and George Seaton. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State of Georgia. The United States of America was a defendant intervenor.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 2

A. The Proceedings Below 2

B. Racial Discrimination and Bloc Voting in Georgia 4

C. Discrimination in Prior Congressional Redistricting 10

1. The 1971 Plan 10

2. The 1981 Plan 11

D. 1991 Congressional Redistricting 13

1. The First Plan 16

2. The Second Plan 17

3. The Third Plan 18

E. The Decision of the District Court 23

Summary of Argument 29

Argument 30

I. Georgia's Congressional Redistricting Is not Subject to Strict Scrutiny 30

A. The Eleventh District Is not Bizarre 36

TABLE OF CONTENTS – Continued

Page

B. Race Was not the Sole Motivating Factor .. 38

C. The Absence of Harm 38

II. The Eleventh District Would Survive Strict Scrutiny 42

A. The State's Interest Is Compelling..... 42

B. The Eleventh District Is Narrowly Tailored .. 45

III. The Court Below Erred in Judicially Reviewing the Section 5 Objection of the Attorney General 46

IV. Plaintiffs Lack Standing 48

Conclusion 50

Appendix.....App. 1

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 47

Allen v. Wright, 468 U.S. 737 (1984) 49

Beer v. United States, 425 U.S. 130 (1976) 34, 43

Burton v. Sheheen, 793 F.2d 1329 (D.S.C. 1992) 37

Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983) 10, 11, 12, 13, 18, 26

Cane v. Worcester County, Maryland, 35 F.3d 921 (4th Cir. 1994) 37

City of Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989) 41, 43, 44

City of Rome v. United States, 446 U.S. 156 (1980) 45

Clark v. Calhoun County, 21 F.3d 92 (5th Cir. 1994) 36

Concerned Citizens Committee v. Laurens County, Georgia, Civ. No. CV392-033 (Sept. 8, 1994) 25

Davis v. Bandemer, 478 U.S. 109 (1986) 34, 39

Diamond v. Charles, 476 U.S. 54 (1986) 49

Fullilove v. Klutznick, 448 U.S. 448 (1980) 43

Gaffney v. Cummings, 412 U.S. 735 (1973) 31, 34

Georgia v. United States, 411 U.S. 526 (1973) 28

Gingles v. Edmisten, 590 F.Supp. 345 (E.D.N.C. 1984) 41

Harris v. Bell, 562 F.2d 772 (D.C.Cir. 1977) 47

Holder v. Hall, 114 S.Ct. 2581 (1994) 36

Johnson v. De Grandy, 114 S.Ct. 2647 (1994) 45, 46

Karcher v. Daggett, 462 U.S. 725 (1983) 46

TABLE OF AUTHORITIES – Continued

Page

Katzenbach v. Morgan, 384 U.S. 641 (1966) 41

Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992) 48, 49

McDaniel v. Sanchez, 452 U.S. 130 (1981)..... 47

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) 42. 43

Mobile v. Bolden, 446 U.S. 55 (1980) 34

Morris v. Gressette, 432 U.S. 491 (1977) 47

Perkins v. Matthews, 400 U.S. 379 (1971)..... 46

Presley v. Etowah County Commission, 112 S.Ct. 820 (1992)..... 43

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)..... 41

Reynolds v. Sims, 377 U.S. 533 (1964)..... 32

Rogers v. Lodge, 458 U.S. 613 (1982)..... 35

Shaw v. Hunt, 861 F.Supp. 408 (E.D.N.C. 1994)..... 44

Shaw v. Reno, 113 S.Ct. 2826 (1993)..... *passim*

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 42, 44, 47

SRAC v. Theodore, 113 S.Ct. 2954 (1992) 37

Thornburg v. Gingles, 478 U.S. 30 (1986) 14, 35, 41, 44

United Jewish Organizations of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977)..... 32, 33, 34, 43

United States v. Board of Supervisors of Warren County, Mississippi, 429 U.S. 642 (1977)..... 47

United States v. Paradise, 480 U.S. 149 (1987) 45

TABLE OF AUTHORITIES – Continued

Page

Voinovich v. Quilter, 113 S.Ct 1149 (1993) 32

Warth v. Seldin, 422 U.S. 490 (1975)..... 49

Wilson v. Eu, 823 P.2d 545 (Cal. 1992)..... 37

Wesberry v. Sanders, 376 U.S. 1 (1964) 10

Wygant v. Board of Education, 476 U.S. 276 (1986) 41, 44, 45

CONSTITUTIONAL PROVISIONS:

Article III, Section I of the Constitution of the United States..... 47

Fourteenth Amendment of the Constitution of the United States..... 2, 3, 31

STATUTES AND REGULATIONS:

28 U.S.C. § 1253..... 2

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ..... 2, 6, 35, 44

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c..... *passim*

28 C.F.R. § 51.29..... 28

OTHER AUTHORITIES:

Aleinkoff and Issacharoff, "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 Mich.L.Rev. 588 (1993)..... 33

Barone and Ujifusa, The Almanac of American Politics (1984) 13, 40

TABLE OF AUTHORITIES – Continued

Page

Barone, Ujifusa, and Matthews, The Almanac of American Politics (1974) 11

Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts in the South, The Evolving Party System and Some Observations on the New Political Order (Joint Center for Political and Economic Studies, 1995) (forthcoming) 40

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S.Rep. No. 417, 97th Cong., 2d Sess. (1982) 40

Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 40

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On Appeal From The United States District Court
For The Southern District Of Georgia
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BRIEF OF APPELLANTS

OPINIONS BELOW

The September 12, 1994 opinion of the three judge court for the Southern District of Georgia (J.S.App. 1-102) holding Georgia's Eleventh Congressional District unconstitutional is reported at 864 F.Supp. 1354. The June 14, 1994 order of the court denying the motion to dismiss for lack of standing is unreported and appears at J.S.App. 103.

JURISDICTION

The opinion and order of the three judge district court was entered on September 12, 1994. Appellants

filed their notice of appeal on September 14, 1994. J.S.App. 112. Probable jurisdiction was noted on January 6, 1995. 63 U.S.L.W. 3499. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the case are the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 and 1973c, the pertinent texts of which are set out at J.S.App. 115-18.

STATEMENT OF THE CASE

A. The Proceedings Below.

Appellees, plaintiffs below, are white residents of Georgia who challenged the state's 1990 congressional redistricting on constitutional grounds. One of the plaintiffs, George L. DeLoach, was an unsuccessful candidate in the 1992 Democratic primary for the Eleventh Congressional District. Substitute Joint Submission of the Parties, Exhibit A, Stipulations 44, 47 (hereinafter "Stip.");[1] Trial Transcript, Volume I, p. 5 (hereinafter "T.Vol."); T.Vol.VI,53. The defendants below were Zell Miller, Governor of Georgia, Pierre Howard, Lieutenant Governor of Georgia, Thomas Murphy, Speaker of the House of Representatives of Georgia, and Max Cleland, Secretary of State

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[1] The parties agreed as to the accuracy and materiality of Stips. 1-73, and as to the accuracy but not the materiality of Stips. 74-242.

of Georgia. Appellants, who were defendant intervenors below (hereinafter "Abrams intervenors"), are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District. J.A. 2. The United States of America was also a defendant intervenor.

Appellees brought this action on January 13, 1994, alleging that "there is no explanation for the configuration of the Eleventh Congressional District except as an expression of racial gerrymandering" in violation of *Shaw v. Reno*, 113 S.Ct. 2826 (1993). Complaint, ¶ 1. Plaintiffs sought a declaration that the existing plan was unconstitutional, and an injunction requiring the state "to prepare a new redistricting plan." Complaint, p. 13.

The Abrams intervenors filed a motion to dismiss the complaint because plaintiffs lacked standing. That motion was denied without a hearing. J.S.App. 103, 111. Appellees filed a motion for a preliminary injunction seeking to enjoin the state's congressional elections. Following a hearing, the three judge court unanimously denied the motion. J.A. 3. After trial on the merits a majority of the district court held that the Eleventh District violated the equal protection clause of the Fourteenth Amendment and permanently enjoined further elections in the district. Circuit Judge Edmondson dissented. J.S.App. 1, 91-2.

Defendants Miller, Howard, and Cleland (hereinafter "the state appellants"), the Abrams intervenors, and the United States filed notices of appeal. J.A. 7-8. This Court granted a stay upon separate applications of all appellants on September 23, 1994. The Abrams intervenors filed a jurisdictional statement on November 2, 1994, and the Court noted probable jurisdiction.

B. Racial Discrimination and Bloc Voting in Georgia.

Georgia has a long and continuing history of discrimination against blacks in all areas of life, particularly in the electoral process and in congressional redistricting. That history was so well documented the district court ruled that evidence of discrimination "against black people in the State of Georgia need not be presented for purposes of this case." J.S.App. 119; T.Vol.V,142. The court took judicial notice that:

> No one can deny that state and local governments of Georgia in the past utilized widespread, pervasive practices to segregate the races which had the effect of repressing black citizens, individually and as a group.
>
> . . . . By law, public schools and public housing were segregated according to race. Public recreational facilities were segregated. Miscegenation was prohibited. Ordinances required segregation in public transportation, restaurants, hotels, restrooms, theaters, and other such facilities, even drinking fountains.
>
> . . . . Public services were allocated along racial lines. . . . In public employment, black workers were often paid less than white workers for the same job. In addition, methods of jury selection were developed to exclude black people from jury service.
>
> Georgia's history on voting rights includes discrimination against black citizens. From the state's first Constitution – which barred blacks from voting altogether – *through recent times*, the state has employed various means of destroying or diluting black voting strength. For example,

> literacy tests (enacted as late as 1958) and property requirements were early means of excluding large numbers of blacks from the voting process. Also, white primaries unconstitutionally prevented blacks from voting in primary elections at the state and county level.
>
> Even after black citizens were provided access to voting, the state used various means to minimize their voting power. For example, until 1962 the county unit system was used to undermine the voting strength of counties with large black populations. Congressional districts have been drawn in the past to discriminate against black citizens by minimizing their voting potential. State plans discriminated by packing an excessive number of black citizens into a single district or splitting large and contiguous groups of black citizens between multiple districts.

J.S.App. 119-20 (emphasis added).[2]

A continuing pattern of racial discrimination in voting in the state was so self-evident that the court refused to accept as exhibits 17 consent decrees offered by the Abrams intervenors entered between 1977 and 1993 in Section 2 challenges brought against jurisdictions located in whole or in part within the Eleventh District. The court

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[2] This history and its continuing effects are set out in greater detail in the stipulations of the parties. *See, e.g.*, Stips. 5 (whites registered in 1992 at 70.2% of voting age population; blacks at 59.8%), 76-103 (detailing the history of discrimination in voting), 104-129 (describing segregation in educational institutions), 130-134 (noting other forms of racial discrimination), 135-55 (stipulating to racial disparities in income, education, unemployment, and poverty status). J.A. 9-33.

ruled that the decrees showed "a pattern of racial discrimination in Voting Rights that we have already taken judicial notice of." T.Vol.VI,207.

While the decrees themselves were disallowed as exhibits, the parties stipulated that "voting rights litigation against the jurisdiction [located in whole or in part in the present Eleventh District] resulted in changes in the challenged electoral system(s) and/or judicial findings of racial bloc voting" in Baldwin County, Milledgeville, Burke County, Effingham County, Butts County, Greene County, Henry County, Jefferson County, Jenkins County, Putnam County, Richmond County, Augusta, Screven County, Twiggs County, Wilkes County, Waynesboro, and Warrenton. Stip. 103.[3] Courts have also made findings of racial bloc voting in Bleckley, Carroll, Colquitt, DeKalb, Dougherty, and Fulton Counties. Stip. 102.

The experts who testified were in agreement that voting in Georgia is racially polarized. Dr. Allan Lichtman, an expert for the United States, examined more than 300 elections spanning an approximately 20-year period. T.Vol.V,200. He used the standard statistical techniques of ecological regression and extreme case analysis, and examined four sets, or levels, of black/white contests: (1) county level contests throughout the state; (2) county level contests within the Eleventh and Second Districts; (3) six statewide elections partitioned within the boundaries of the Eleventh and Second Districts; and, (4) the

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[3] The court also refused on similar grounds of redundancy to accept as exhibits compilations of Section 2 challenges brought between 1974 and 1990 to at-large elections in 40 cities and 57 counties throughout the state. T.Vol.VI,207.

1992 Eleventh and Second District elections. DOJ Exs. 24, 41; T.Vol.V,199.

As for level one, Dr. Lichtman's analysis showed "strong" patterns of racial bloc voting, with blacks and whites voting "overwhelmingly" for candidates of their own race. DOJ Ex. 24, at 7-8. Level two and three analysis also showed "strong" patterns of racial bloc voting. *Id.* at 8-9; T.Vol.V,202-03. In five of the six statewide contests in the Eleventh District, at least 89% of blacks voted for black candidates, and at least 74% of whites voted for white candidates. DOJ Ex. 24, at 9. The exception to the pattern was the 1992 Democratic primary for labor commissioner in which the black candidate got 45% of the white vote, and 96% of the black vote. In the ensuing primary runoff the black candidate got only 26% of the white vote, and 92% of the black vote. *Id.* at 14.

The 1992 primary and runoff in the Eleventh District were also racially polarized. In the primary, which involved one white and four black candidates, the white candidate, DeLoach, was the first choice among whites with 45% of the white vote. Cynthia McKinney, who was the leading vote getter over all, was second among whites with 20% of the white vote. *Id.* at 17; J.A. 22. In the runoff, whites increased their support of DeLoach to 77%. McKinney's white vote support increased to just 23%. *Id.*

Dr. Lichtman found voting patterns to be different in statewide non-partisan judicial elections in which appointed blacks ran as incumbents. He included these contests in his report but treated them as having "minimal relevance." T.Vol.V,228.

Dr. Lichtman also testified that blacks have a lower socio-economic status than whites which was a barrier to

blacks' participation in the political process. T.Vol.V,206. In the 1988 and 1992 presidential elections, black turnout was 14-15% lower than white turnout. *Id.* at 208. In the 1992 elections in the Eleventh District, blacks were 51.5% of all voters in the primary, but only 46-47% of voters in the runoff. *Id.* at 212-13.

The state's expert, Dr. Joseph Katz, performed an independent homogeneous precinct analysis to estimate "average racial voting patterns." D.Ex.170; T.Vol.V,48,81. He agreed that "[w]hites tend to vote for white candidates and blacks tend to vote for black candidates." T.Vol.V,84. He concluded that whites vote for white candidates in the range of 71-73%. *Id.* He did not believe a black candidate had an even (50%) chance to win until a district contained at least 50% of black registered voters. *Id.* at 84-5. Dr. Katz also found judicial elections to be "materially different" and that it would be "inappropriate" to use them in determining voting patterns in congressional elections. T.Vol.V,74,83.

The plaintiffs' expert, Dr. Ronald Weber, agreed there was "some evidence" of racial polarization in voting. T.Vol.IV,259. Taking into account judicial elections involving appointed black incumbents, he did not think the racial bloc voting was "very strong." *Id.* at 324.

In addition to these judicial findings and expert opinions, Representative Tyrone Brooks testified that "[r]acially polarized voting in this state is a reality, and we cannot run from that." T.Vol.IV,228. Lt. Governor Howard testified that "there are still a lot of white voters in Georgia, I'm sure, who won't vote for a black candidate, and I'm sure that there are a lot of black [voters] who won't vote for a white candidate." T.Vol.IV,220.

Intervenor Lucious Abrams, a Burke County farmer who has worked in a number of local political campaigns, testified that "a black will not win out of a majority white district." T.Vol.VI,57. Kathleen Wilde, a former ACLU staff attorney with extensive experience in voting rights litigation in Georgia who was called as a witness by the plaintiffs, said that "[r]acial polarization is sufficiently strong throughout the state that majority white districts have historically elected white candidates, both state wide and in districting systems." T.Vol.IV,106.

Of the 40 black members of the Georgia general assembly, only one was elected from a majority white district. T.Vol.IV,236; J.A. 26-7. Of the 31 black members of the house, 26 were elected from districts that were 60% or more black. Of the nine black members of the senate, eight were elected from districts that were 60% or more black. Abrams Exs. 23-4; T.Vol.VI,208; DOJ Ex. 57; T.Vol.VI,204. While only one black was elected from a majority white district, whites won in 16 (29%) of the 55 majority black house and senate districts. J.A. 26-7.

With the exception of judicial elections in which blacks were first appointed and ran as incumbents, no black has ever been elected to a statewide office in Georgia. T.Vol.VI,77. No black, other than Andrew Young, has ever been elected to Congress from Georgia from a majority white district. Stip. 241.

C. Discrimination in Prior Congressional Redistricting.[4]

Georgia's 1931 congressional reapportionment was invalidated in *Wesberry v. Sanders*, 376 U.S. 1 (1964), on one person, one vote grounds. The redistricting which followed based on the 1970 census was the first congressional redistricting in the state subject to Section 5 review.

1. The 1971 Plan.

The plan initially passed by the state in 1971 discriminated in three distinct ways. First, it divided the concentration of black population in the metropolitan Atlanta area into the Fourth, Fifth, and Sixth Districts to insure that the Fifth would be majority white. Stips. 170, 173, 180; *Busbee v. Smith, supra*, 549 F.Supp. at 500. Second, it moved the residences of blacks who were recognizable potential candidates from the Fifth to the Sixth District, *i.e.*, Atlanta Vice-Mayor Maynard Jackson and Andrew Young, who had run for the Fifth District in 1970. Stips. 172, 180; *Busbee v. Smith, supra*, 549 F.Supp. at 500. Third, it included in the Fifth District the residences of whites who were recognizable potential candidates. Stip. 172; *Busbee v. Smith, supra.*

Blacks in the house and senate proposed alternative plans during the 1971 redistricting process which increased the minority percentage in the Fifth District.

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[4] The description of the 1971 and 1981 redistricting processes is taken, except where otherwise noted, from the findings of the court in Busbee v. Smith, 549 F.Supp. 494, 500 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), and the stipulations of the parties.

Although these plans were supported by the black members, they were overwhelmingly rejected by the white majority. Stips. 175-78.

The state submitted its plan for preclearance, but the Attorney General objected. He was unable to conclude "that these new boundaries will not have a discriminatory racial effect on voting by minimizing or diluting black voting strength in the Atlanta area." Stip. 179. The state drew another plan increasing the percentage of blacks in the Fifth District to 44%, and the plan was precleared. Stip. 181; Barone, Ujifusa, and Matthews, *The Almanac of American Politics* 232 (1974).

2. The 1981 Plan.

The state's 1981 congressional plan was also the product of intentional discrimination. Based on the 1980 census, the 1971 plan was malapportioned. Stip. 187. All of the districts were majority white, with the exception of the Fifth which was 50.3% black based upon total population. *Busbee v. Smith, supra,* 549 F.Supp. at 498.

The new plan drawn in 1982 maintained white majorities in nine of the ten districts and increased the black population in the Fifth to 57.3%. Stip. 188. While blacks were a slight majority (52%) of the voting age population ("VAP") in the Fifth District, they were a minority (46%) of registered voters. Stip. 189. The plan, as did the 1971 plan, split the concentrated black population in the metropolitan Atlanta area into three districts, the Fourth, Fifth, and Sixth, to minimize minority voting strength. Stips. 190-91, 195, 206, 234-35; *Busbee v. Smith, supra,* 549 F.Supp. at 515.

The state submitted the plan for Section 5 preclearance and the Attorney General objected. Stip. 183. The state then filed a declaratory judgment action in the district court for the District of Columbia, which also denied preclearance. Stip. 186.

The senate, over the objections of some of its members, had passed a congressional plan containing a 69% majority black Fifth District. Stip. 215. Those who objected claimed the plan would divide congressional districts into "black and white" and "bring out resegregation," *Busbee v. Smith, supra,* 549 F.Supp. at 507, and "might allow the black community an opportunity to elect a candidate of its choice to the United States Congress." Stip. 213; *Busbee v. Smith, supra,* 549 F.Supp. at 506.

The house leadership rejected the senate's proposed Fifth District. Stips. 216-18. Joe Mack Wilson, chair of the house reapportionment committee and the person who played the instrumental role in congressional redistricting, explained to his colleagues that "I don't want to draw nigger districts." *Busbee v. Smith, supra,* 549 F.Supp. at 501; Stip. 199. He generally opposed legislation of benefit to blacks, which he referred to as "nigger legislation." Stip. 199; *Busbee v. Smith, supra,* 549 F.Supp. at 500.

Speaker Murphy was also opposed to the senate's Fifth District because he felt "we were gerrymandering a district to create a black district where a black would certainly be elected." *Busbee v. Smith, supra,* 549 F.Supp. at 509-10. The speaker "refused to appoint black persons to the conference committee [to resolve the dispute between the house and senate] solely because they might support a plan which would allow black voters, in one district, an

opportunity to elect a candidate of their choice." Stip. 220; *Busbee v. Smith, supra,* 549 F.Supp. at 510.

The District of Columbia court concluded – on the basis of "overt racial statements, the conscious minimizing of black voting strength, historical discrimination and the absence of a legitimate non-racial reason for adoption of the plan" – that the state's submission had a discriminatory purpose in violation of Section 5. *Busbee v. Smith, supra,* 549 F.Supp. at 517. The state submitted a remedial plan to the court which increased the black VAP in the Fifth District to 60%, and the plan was precleared. Stip. 238; Barone and Ujifusa, *The Almanac of American Politics* 289 (1984).

D. 1991 Congressional Redistricting.

Based on the 1990 census African-Americans are 27% of the total population and 24.6% of VAP in Georgia. J.A. 9. As a result of the census, the state's congressional delegation increased from ten to 11 members. J.S.App. 5.

Prior to the beginning of the 1990s redistricting process, and prior to any involvement by the Department of Justice, state officials agreed upon a goal of increasing the number of majority black congressional districts from one to two. T.Vol.II,37-8,69,123. The establishment of that goal was due to a great extent to the increased number of blacks serving in the general assembly and their advocacy of increasing the number of majority-minority congressional districts. T.Vol.II,124.

Members of the legislative black caucus, led by Representatives Brooks, McKinney, and John White, originated and advocated the idea of creating not two but

three majority-minority congressional districts. T.Vol.IV,101,247-48. A similar position was advocated by black senators on the floor of the senate. T.Vol.III,234-35. They reasoned that because of racial bloc voting three majority-minority districts were needed to provide blacks with equal electoral opportunities roughly in keeping with the black percentage of the state's population. T.Vol.IV,228.

Ms. Wilde, at that time on the staff of the ACLU, prepared a plan for the black caucus which contained three majority-minority districts. J.A. 60-1; T.Vol.IV,101. Her intent in preparing the plan was to comply with the geographic compactness standard of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and to demonstrate that a roughly proportional number of majority black districts could be drawn, not to maximize black voting strength in the sense of creating the greatest possible number of majority-minority districts. T.Vol.IV,71-2. In drawing her plan she followed precinct lines, the state's traditional redistricting building blocks. T.Vol.IV,83.

Ms. Wilde's plan was entered on the state's computer and was officially named MCKINNEY.BMCCONGRESS after Representative McKinney, the plan's principal sponsor and a member of the house reapportionment committee. The plan was also referred to as the Black Max or Max plan. J.A. 60-1; J.S.App. 99 n.5; T.Vol.II,30-1. The NAACP, the Georgia Association of Black Elected Officials, Concerned Black Clergy, and the Southern Christian Leadership Conference endorsed the McKinney-black caucus plan. T.Vol.IV,86,230,233.

Lt. Governor Pierre Howard, who is white and is the president of the senate, also supported the concept of

three majority black congressional districts. He advised Senator Eugene Walker, the black chair of the senate reapportionment committee, that "I was willing to try to do the right thing about creating three districts." T.Vol.IV,205. He denied that in taking such a position he was acting under pressure from the Department of Justice. *Id.* at 206. He did not, however, support the inclusion of portions of Savannah in the Eleventh District. *Id.*

Redistricting began during the 1991 legislative session. Stip. 7. Both houses adopted redistricting guidelines which included: complying with one person, one vote; using single member districts only; drawing districts that were contiguous; avoiding the dilution of minority voting strength; maintaining the integrity of political subdivisions where possible; protecting incumbents; and, preserving the core of existing districts. J.S.App. 5; J.A. 65-77. Compactness was not a redistricting criteria.

The guidelines were designed to "maximize public input before and after the committee's redistricting plans have been made." J.A. 65,72. The public was provided access to all the committees' documents and records, including all data bases used in redistricting. Proposed redistricting plans could be presented to the committees by any individual or organization. All proposed plans, including those prepared by legislators, were required to be race-conscious, *i.e.*, to show "the minority population for each proposed district." J.A. 68,74.

Public hearings were held throughout the state in April, May, and August of 1991. At the first public hearing in April, the chairman of the Georgia Republican Party submitted a plan creating a majority black district extending from south DeKalb County to Augusta. J.A. 82;

T.Vol.II,153. The plan was entered on the state's computer as LINDA.TEMPLATE. LINDA.TEMPLATE became the model for the Eleventh District. T.Vol.II,16,20,153-54.

A special session of the general assembly was held from August 19 to September 5, 1991 for the purpose of redistricting. A great many congressional plans were proposed and introduced during the public hearings, the work sessions of the redistricting committees, and the special session of the legislature. All the proposed plans included between one and three majority black districts. J.A. 13. Representative Brooks introduced the McKinney-black caucus plan in the house in committee and offered it as an amendment on the floor but the plan was never adopted. T.Vol.IV,230; J.S.App. 99 n.5.

1. The First Plan.

The state submitted its first congressional redistricting plan to the Department of Justice under Section 5 on October 1, 1991. The plan contained two majority-minority districts (the Fifth – 57.8% black VAP – and the Eleventh – 56.6% black VAP), and a third district (the Second) with 35.4% black VAP. J.S.App. 12 n.5; J.A. 14-5. The Eleventh District in the first plan was modeled "almost exactly" after LINDA.TEMPLATE. T.Vol.II,20,153-54; J.A. 82.

The Attorney General objected to the state's plan by letter dated January 21, 1992, on the grounds that: "elections in the State of Georgia are characterized by a pattern of racially polarized voting;" "the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts;" the leadership did not make a good faith attempt to "recognize the black

voting potential of the large concentration of minorities in southwest Georgia;" and, the state had provided only pretextual reasons for failing to include in the Eleventh District the minority population in Baldwin County. J.A. 99,105-07.

2. The Second Plan.

After the Section 5 objection, the reapportionment committees and the general assembly considered numerous other plans. J.A. 17. The senate passed a plan, REDRAW.SREDRAW2, containing three majority black districts and in which the black VAP in the Eleventh District was increased from 56.6% to 58.7%. The Eleventh District included concentrations of black population in south Dekalb County, Augusta, and Savannah. J.A. 62,98. The conference committee rejected the senate's plan. T.Vol.III,212-13,234.

The state enacted a second plan and submitted it for preclearance, again containing two majority black districts (the Fifth – 57.5% black VAP – and the Eleventh – 58% black VAP) and a third district (the Second) with 45% black VAP. J.S.App. 17 n.9; J.A. 17-8,54. Once again, the Eleventh District was modeled on LINDA.TEMPLATE, and included minority population from Baldwin County. T.Vol.II,153-54; J.A. 82.

The Attorney General objected to the second plan on March 20, 1992 on the grounds that: the state remained "predisposed to limit black voting potential to two black majority voting age population districts;" "alternatives including one adopted by the Senate included a large number of black voters from Screven, Effingham and Chatham Counties in the 11th Congressional District;"

and, the state had provided "no legitimate reason" for its failure to include in a majority black congressional district the second largest concentration of blacks in the state. J.A. 120,124-26.

The state made the decision not to seek judicial preclearance of its plans from the district court for the District of Columbia. J.A. 21. Mark Cohen, the state's chief legal advisor during redistricting, recommended against seeking judicial preclearance because he felt the chances of winning approval "were very much harmed by the *Busbee* case, that we were in a similar situation because of the Senate's action." T.Vol.V,6. Representative Bob Hanner, chair of the house reapportionment committee, opposed filing a lawsuit because he felt the state should conduct its own redistricting and that the plan passed by the senate (REDRAW.SREDRAW2) would cause the court to reject the first and second plans. T.Vol.III,246,262. Speaker Murphy expressed similar reasons for not seeking judicial preclearance. T.Vol.II,63,80,99.

3. The Third Plan.

The state submitted a third plan to the Attorney General, which is the subject of this litigation, containing three majority black districts (the Fifth – 57.5% black VAP, the Eleventh – 60.4% black VAP, and the Second – 52.3% black VAP) on April 1, 1992. J.A. 19-20,51-2. The plan maintained the south DeKalb to Augusta core of the Eleventh District similar to that in the first and second plans. It also incorporated features of the senate plan (REDRAW.SREDRAW2) in that it included portions of Savannah in the Eleventh District. J.S.App. 93 n.1. The plan was similar to the McKinney-black caucus plan in

that it contained three majority black districts, but as Judge Edmondson found it was "significantly different in shape in many ways." J.S.App. 99 n.5, 192. The submission was precleared on April 2, 1992. J.S.App. 23.

The Eleventh District is not a regular geometric form, but neither are any of the state's other congressional districts. Prior plans had irregular districts, such as the Eighth District under the 1980 plan. J.A. 80; T.Vol.II,84; T.Vol.VI,70. Under the 1992 plan the Eighth District goes from the suburbs of Atlanta all the way to the Florida line. T.Vol.III,268. In addition, as Judge Edmondson found, the Eleventh is far more regular looking in shape than other congressional districts that have been challenged in the wake of *Shaw v. Reno, supra,* such as the Twelfth in North Carolina and the Z-shaped Fourth in Louisiana. J.S.App. 99-100.

Plaintiffs' own expert testified that, based upon quantitative measures, "the Eleventh District scored above traditional cutoffs for compactness," J.S.App. 101 n.6, and that if a district is above the cutoff, "you probably don't need to worry about these issues [of compactness]", T.Vol.IV,276-279, "you don't look." *Id.* at 286. He also agreed that "geographical compactness" is "such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law." T.Vol.IV,282.

Judge Edmondson found that social science measures for compactness "show the Eleventh District is not bizarre or highly irregular." J.S.App. 100. While not endorsing the reliability of the measures, he concluded that "[a]ccording to perimeter scoring, the Eleventh is

more compact than approximately forty-six other congressional districts in the country." *Id.*; T.Vol.III,179-80. Under "dispersion measurements, the Eleventh is more compact than about twenty-nine other districts." *Id.*

Creating a majority black Eleventh District and complying with the Attorney General's Section 5 objections were admittedly significant factors in the state's adoption of its final plan, but they were not the only significant factors. While it did not discuss them in any detail, the majority noted that the general assembly "was concerned with passing redistricting legislation affecting all Georgians, and contended with numerous factors racial, political, economic, and personal." J.S.App. 26. The state's "submissions reflected many influences." *Id.*

In compliance with the state's guidelines, the Eleventh District substantially follows traditional political boundaries. Seventy-one percent of the district's line follows state, county, and municipal boundaries, a greater percentage than in five other districts in the state. J.S.App. 98; T.Vol.V,109. Again following the redistricting guidelines, 87% of the area within the Eleventh District is composed of intact counties, a greater percentage than in seven other districts. J.S.App. 98. The majority (94%) white Sixth District contains *no* intact counties. J.A. 20,27.

Partisan politics played an important role in the configuration of district lines. J.S.App. 95 n.2. In general, Republicans favored a plan which would increase the number of districts in which Republicans might control the outcome of elections by increasing the number of majority black districts. T.Vol.II,67-8.

Partisan political concerns and the purely personal preferences of individual legislators dictated the construction of district lines in many ways. Speaker Murphy, an ardent Democrat, advised the chairman of the house reapportionment committee that he (Murphy) would not support any plan that included Harrelson County, Murphy's county of residence, in the Sixth Congressional District. The reason the speaker did not want Harrelson County to be included in the Sixth District had nothing to do with race but was based on the fact that the district was represented by Republican Newt Gingrich. T.Vol.II,73,75,77. According to Speaker Murphy, "Congressman Gingrich and I never got along. We didn't talk. We didn't like each other and I just wanted out of his district." T.Vol.II,77. As a result, "all the counties got split in the Sixth." T.Vol.III,729.

Speaker Murphy intervened in congressional redistricting on other occasions, none of which were related to race. After the second objection by the Attorney General, he helped move precinct lines in DeKalb County as a personal favor to the lieutenant governor. The lieutenant governor wanted to make sure the county of then Senator Don Johnson was in the Tenth District, a district in which Johnson could presumably win. On another occasion, Speaker Murphy helped move precinct lines in Gwinnett County at the request of a house colleague. T.Vol.II,78-9.

Other non-racial factors not discussed by the majority drove congressional redistricting and contributed to the shape of the Eleventh District. The state made a political decision to keep several rural majority white counties in the Eleventh District intact, even though it resulted in drawing more irregular lines elsewhere in the district, *i.e.*, making "them a little bit more crooked and

maybe not follow the major thoroughfare all the way through," in urban areas such as Augusta and Savannah. T.Vol.I,29-30,143-44.

The shape of the Eleventh District was drawn in an irregular manner near the eastern border of DeKalb County to accommodate the request of the chair of the senate reapportionment committee that the majority white precinct in which his son lived be included in the district. T.Vol.II,187,202. Perhaps the most irregular part of the Eleventh District is in western DeKalb County. However, the irregularity is a function of the fact that the line follows the boundary of the city of Atlanta. T.Vol.II,197. At its narrowest point in DeKalb County, the Eleventh District is constricted on one side by the traditional boundaries of a major highway and on the other by the city limits of Avondale Estates. T.Vol.II,199-200.

In Richmond County, the Eleventh District substantially follows precinct lines, municipal boundaries, and major roadways. T.Vol.II,224. As Judge Edmondson found, "the Eleventh makes curious turns in some areas . . . [b]ut, in these areas most of the lines follow existing city boundaries or major highways and roads." J.S.App. 98.

Part of the Eleventh District was drawn into Butts and Henry Counties, rather than in Newton and Rockdale Counties, for purely political reasons to get the votes of certain legislators. T.Vol.II,206-09. The portion of the Eleventh District in Henry County is narrow because the state made the non-racial decision to follow precinct lines. T.Vol.I,207-09.

The district is narrow in Chatham County because a local white representative, Sonny Dixon, wanted it drawn

"by the narrowest means possible," T.Vol.IV,174, to keep as much of the county in the First District as possible, especially all of Port Wentworth, Garden City, the Garden City marine shipping terminal, and several industrial plants north of Savannah. T.Vol.IV,172-78. Even then, as Representative Dixon explained, the line "was not arbitrarily selected" but follows "my State House District," as well as the city of Savannah boundary. T.Vol.IV,177,178 ("[w]e tried to use common lines between State House Senate and congressional plans").

The Eleventh is narrow in Effingham County for virtually the same reason, *i.e.*, a local white representative wanted to keep as much of the county out of the Eleventh as possible. J.S.App. 44 n.25; T.Vol.I,107-09. "Politics" influenced the decision about where to draw district lines in Baldwin County as well. T.Vol.III,265.

According to Speaker Murphy, redistricting is "vastly different" from other matters that come before the general assembly because "it's not just a one-issue thing. There's hundreds of issues because there are hundreds of people wanting their property and their county in a different district." T.Vol.II,92-3.

E. The Decision of the District Court.

The majority found that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." J.S.App. 31. The record is also devoid of evidence of harm to anyone else, or to any interest identified by the Court in *Shaw*, *i.e.*, increasing racial bloc voting or depriving voters of effective representation. *See* 113 S.Ct.

at 2827-28. A parade of witnesses testified that the Eleventh District has not increased racial tension, T.Vol.VI,45,120, caused segregation, T.Vol.IV,104,242, T.Vol.VI,47,58, imposed a racial stigma, T.Vol.IV,104,240, T.Vol.VI,38, deprived anyone of representation, T.Vol.VI,36,56,117, caused harm, T.Vol.III,268, and is not a guaranteed black seat. T.Vol.IV,106,239, T.Vol.VI,57,125. The court acknowledged that "[u]nder the Supreme Court's most recent pronouncements, this lack of concrete, individual harm would deny them standing to sue." J.S.App. 31. Nonetheless, in the majority's view "*Shaw v. Reno*'s expanded notion of harm liberalizes the standing requirement." J.S.App. 33. In its order denying the Abrams intervenors' motion to dismiss for lack of standing, the court ruled that it was not even necessary for a plaintiff to *reside* in an irregularly shaped district to have standing to challenge it. J.S.App. 104-09. The harm suffered by plaintiffs was "systemic," and flowed simply from the existence of a district which the majority deemed was irregularly shaped. J.S.App. 32. For that reason, a "regularly shaped" district, even though drawn for reasons of race, could not confer standing. J.S.App. 32 and n.17 ("a compact majority-black voting district could not be challenged as a racial 'gerrymander' "); J.S.App. 42 n.24 ("a bizarre district shape is indeed a 'threshold' for purposes of standing").

While a bizarre shape was a requirement for standing, the majority held that "[t]he shape of the district is *not* a 'threshold' inquiry preceding an exploration of the motives of the legislature." J.S.App. 30. Strict constitutional scrutiny was required where it is "shown that race was the *substantial or motivating consideration* in creation of the district in question." J.S.App. 36 (footnote omitted).

Thus, the majority held that the consideration of race in redistricting was not sufficiently harmful to confer standing, but it was sufficiently harmful to trigger strict scrutiny.

Elsewhere in its opinion the majority held that *any* consideration of race in redistricting was constitutionally prohibited. Taking into account "the racial community of interest shared by black citizens in Georgia . . . is barred from constitutional recognition." J.S.App. 45. Despite its extensive judicial notice of past discrimination and its continuing effects in Georgia, J.S.App. 119, the court held that "[a] voting district . . . that is configured to cater to . . . 'black' concerns is simply a race-based voting district. It is based on superficial, racially founded generalizations," and "trafficks in racial stereotypes." J.S.App. 46. During the cross-examination of plaintiffs' expert, however, who admitted that he had taken race into account in drawing redistricting plans containing odd shapes as a consultant in other voting cases, Judge Bowen admonished the witness that "we've all done districting on account of race. There is no reason to be embarrassed about that." T.Vol.III,164.[5]

Race was a substantial factor in the construction of the state's Ninth Congressional District. The Ninth, which is approximately 95% white, J.A. 20, was created

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[5] Indeed, during a recess in the trial, Judge Bowen met with attorneys in another voting case "to re-draw Laurens County." T.Vol.V,141. He drew a court ordered plan intentionally creating two majority black districts. *Concerned Citizens Committee v. Laurens County, Georgia*, Civ. No. CV392-033 (Sept. 8, 1994). A copy of the order is reproduced in the appendix hereto at App. 1. One of the majority black districts was divided by a river and was "contiguous" only by virtue of an auto and foot bridge. App. 7.

during the 1980 redistricting process to preserve in one district the distinctive white community in the mountain area of the state. T.Vol.II,254-55; *Busbee v. Smith, supra,* 549 F.Supp. at 499, 517 (the state "placed cohesive white communities throughout the state of Georgia into single Congressional districts . . . [f]or example, the so-called 'mountain counties' of North Georgia"). The district was again drawn as a majority white district during the 1990 redistricting process, and for the same reasons as in 1980. Tr.Prelim.Injun. 126-28. Despite the fact that race was a substantial or motivating factor in its construction, the majority did not hold that the Ninth, like the Eleventh, was constitutionally suspect or should be subjected to strict scrutiny.

The majority held that the Eleventh District was racially gerrymandered and stressed that it used narrow "land bridges" to DeKalb, Richmond and Chatham Counties to link centers of population. J.S.App. 43. Land bridges, which are narrow corridors that may or may not contain population, are not unique to the Eleventh District, nor to the 1990 redistricting process. As Judge Edmondson found, land bridges are used in the current Seventh District, and were used in the 1970 congressional redistricting plan. J.S.App. 98-9. The current Eighth District also includes a land bridge. T.Vol.III,268. Moreover, as the majority found, the land bridge to Chatham County through Effingham was drawn in a narrow manner for non-racial reasons, *i.e.*, "the representative from that area succeeded in narrowing the bridge . . . by keeping as much of the resident population within the adjacent First Congressional District as possible." J.S.App. 44 n.25.

In the majority's view, additional evidence of an improper racial motive in the construction of the district

included simply the fact that the district was majority black: "[o]ther observations shed light on the racial manipulations behind the Eleventh, most notably the simple one that the total black population of Georgia is 26.96%, while within the Eleventh it is 64.07%." J.S.App. 48. The court did not find a similar racial motive in the construction of congressional districts in which whites exceeded their percentage of the state's population.

Although it acknowledged that "decisions of the Attorney General are not reviewable by this Court," J.S.App. 63 n.32, the majority nonetheless directly reviewed the Section 5 determination of the Attorney General and held that it was "improper . . . because it compelled legislative efforts not reasonably necessary/ narrowly tailored to the written dictates of the VRA." J.S.App. 63. According to the majority, "DOJ stretched the VRA farther than intended by Congress or allowed by the Constitution." J.S.App. 65; 66 ("DOJ clearly disregarded" applicable Voting Rights Act regulations); 26 (the Attorney General's "reading of the Voting Rights Act" was "misguided"). Because the Attorney General was "wrong" in his interpretation of Section 5, the state had "no compelling interest" in complying with the objection. J.S.App. 62.[6] The majority also held that "Georgia's current redistricting plan exceeds what is reasonably necessary to avoid retrogression under Section 5." J.S.App. 68.

The majority was highly critical of the role played by black legislators in the redistricting process, whom it

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[6] The majority further held that a compelling state interest in remedying prior discrimination in voting "does not exist independent of the Voting Rights Act." J.S.App. 56; 57 ("[a]ny independent state interest in the remedial revision of voting laws is subsumed within that broad federal legislation").

castigated as "partisan 'informants' " and "secret agents," as well as the ACLU in providing information to the Attorney General and proposing alternative redistricting plans on behalf of minority and civil rights groups. J.S.App. 24, 27. The chair of the house reapportionment committee, however, denied that there was anything improper about the ACLU assisting or being an effective advocate for the black caucus. T.Vol.III,271-72. The regulations promulgated by the Attorney General for the administration of Section 5, which have been held constitutional, *Georgia v. United States*, 411 U.S. 526, 536 (1973), permit, and indeed encourage, comments from interested third parties. 28 C.F.R. § 51.29.

Some black legislators and the ACLU urged the Attorney General to object to the plan that was precleared, T.Vol.IV,103, while as Judge Edmondson found, the adopted plan "is significantly different in shape in many ways" from the plan proposed by the ACLU. J.S.App. 99 n.5; T.Vol.IV,107. Far from showing that the ACLU or "partisan 'informants' " and "secret agents" dominated the Attorney General and the preclearance/redistricting process, the plan adopted by the state showed, according to Judge Edmondson, "consideration of other matters beyond race, including traditional districting factors (such as keeping political subdivisions intact) and the usual political process of compromise and trades for a variety of nonracial reasons." J.S.App. 99 n.5.

The majority also concluded that the Eleventh District was not narrowly tailored because it contained a larger concentration of minority voters than reasonably necessary to give blacks a realistic opportunity to elect candidates of their choice. J.S.App. 88-9. The court conceded that "some degree of vote polarization exists," but that "[e]xact levels are unknowable." J.S.App. 83.

In his dissenting opinion, Judge Edmondson held that *Shaw v. Reno, supra,* 113 S.Ct. at 2832, is narrow and applies only to "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race." J.S.App. 97. In concluding that the Eleventh District was not bizarrely shaped, he found, *inter alia,* that: "[t]he size of the district is not particularly noteworthy;" "[t]he district's . . . miles of borders is not distinctive;" the district "shows considerable respect for existing political boundaries;" "eighty-three percent of the Eleventh's area comes from whole counties. In comparison, the average among the State's other districts is sixty-two and one-half percent;" "Georgia's congressional districts have no tradition of being neat, geometric shapes;" areas in other Georgia congressional districts "look – as irregular or – much more irregular;" and, "[q]ualitative measurements for compactness . . . show the Eleventh District is not bizarre or highly irregular." J.S.App. 97-100.

SUMMARY OF ARGUMENT

Shaw v. Reno is a narrow decision and subjects to strict scrutiny only those districts which are bizarre in shape, are race conscious, and segregate or harm voters. The Court has recognized that in the redistricting process race may be taken into account along with other factors.

The Eleventh District is not bizarre in shape compared with the district in *Shaw* or with other congressional districts. Race was not the sole factor in the construction of the Eleventh District. Numerous factors drove the redistricting process, such as following political boundaries, protecting incumbents, and accommodating a variety of economic, personal, and political interests.

No persons were harmed by the state's redistricting. There was no evidence that anyone was unfairly stereotyped, that patterns of racial bloc voting were exacerbated, that anyone was deprived of effective representation, or that the voting strength of anyone was diluted. The majority black districts are in fact the most racially integrated districts in the state.

Although strict scrutiny is not applicable, the Eleventh District would be constitutional if it were. In adopting its plan the state had a compelling interest in complying with the Voting Rights Act. The plan is not a racial quota, makes no greater use of race than necessary, is limited in duration, and does not harm third parties.

The lower court erred in judicially reviewing the Attorney General's Section 5 objection and concluding that it was improper. While a local court may judicially decide coverage, only the District of Columbia court may determine if a voting change violates Section 5.

The plaintiffs were not harmed by the state's redistricting. In the absence of individualized harm, plaintiffs lack standing.

ARGUMENT

I. Georgia's Congressional Redistricting Is not Subject to Strict Scrutiny

The court below held that strict constitutional scrutiny was required where it is "shown that race was the *substantial or motivating consideration* in creation of the district in question." J.S.App. 36. It also held that *any* consideration of race in redistricting was constitutionally prohibited. Taking into account "the racial community of interest shared by black citizens in Georgia . . . is barred

from constitutional recognition." J.S.App. 45. The decision of the district court is contrary to *Shaw v. Reno* and other decisions of this Court.

Shaw held that "a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification," is subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment. 113 S.Ct. at 2832. To establish a claim and invoke strict scrutiny under *Shaw*, therefore, a plaintiff must establish three elements: (1) the challenged plan must be "bizarre" or "irrational" on its face, 113 S.Ct. at 2825, 2832, and not merely "somewhat irregular," *id.* at 2826; (2) the plan must be "unexplainable on grounds other than race," *id.* at 2825; and, (3) the "only" possible explanation for the plan must be a purpose to "segregate" the races for purposes of voting. *Id.* at 2832. Stated succinctly, the conjunction of bizarre shape, race consciousness, and harm are the essential predicates for a claim under *Shaw*.

Shaw repeatedly stated that it concerned only districting plans that were "bizarre," 113 S.Ct. at 2818, 2825-26, 2831, 2843, 2845, 2848, facially "irrational," *id.* at 2818, 2829, 2832, 2842, "highly irregular," *id.* at 2826, 2829, "extremely irregular," *id.* at 2824, "dramatically irregular," *id.* at 2820, or "tortured." *Id.* at 2827. By its terms the decision applies only to the "rare" and "exceptional cases." *Id.* at 2825-26.

Moreover, the Court did not indicate that bizarre shape *alone* raised constitutional concerns or triggered strict scrutiny. It expressly reaffirmed that "compactness" was not "constitutionally required." 113 S.Ct. at 2827. *See Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973). A

contrary rule would radically transform federal-state relations in reapportionment by subordinating all state interests to an overriding federal requirement of compactness. *Cf. Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993) ("it is the domain of the states, and not the federal courts, to conduct apportionment in the first place"). Elevating concerns about mere physical geography to constitutional status would also undermine the Court's oft-repeated admonition that "[l]egislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Nor does *Shaw* condemn the consideration of race in redistricting *per se* as the lower court erroneously held. According to *Shaw*, "race-conscious redistricting is not always unconstitutional." 113 S.Ct. at 2824, 2826 ("race consciousness does not lead inevitably to impermissible race discrimination"). The Court expressed "no view as to whether 'the intentional creation of majority-minority districts, without more' always gives rise to an equal protection claim." 113 S.Ct. at 2828.

Shaw did not overrule *United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 165 (1977), which upheld without subjecting to strict scrutiny a state's legislative redistricting plan that "deliberately used race in a purposeful manner" to create majority-minority districts. The Court found no constitutional violation because there was no dilution of the plaintiffs' voting strength. *Id.* at 165-66 (White, J. joined by Stevens, J. and Rehnquist, J.); *id.* at 179-80 (Stewart, J., concurring, joined by Powell, J.).

Shaw distinguished *UJO* on the grounds that the plaintiffs in *UJO* "did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race." 113

S.Ct. at 2829. Thus, in its discussion of *UJO*, *Shaw* underscores that the consideration of race in redistricting is constitutionally suspect only in the context of bizarre district shape and harm to voters.[7]

The decision of the district court that race "'is barred from constitutional recognition" in redistricting, J.S.App. 45, ignores both the reality and purpose of redistricting. *Shaw* recognized that:

> redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religion and political persuasion, and a variety of other demographic factors.

113 S.Ct. at 2826.[8] This Court has consistently recognized that "[d]istrict lines are rarely neutral phenomena," and

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[7] Commentators have agreed that "*Shaw* is best read as an exceptional doctrine for aberrational contexts rather than as a prelude to a sweeping constitutional condemnation of race-conscious redistricting." Pildes and Niemi, "Expressive Harms, 'Bizarre District,' and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno*," 92 Mich.L.Rev. 483, 495 (1993). According to Pildes and Niemi, the unique harm communicated by a bizarre district is "the social impression that race consciousness has overridden all other, traditionally relevant redistricting values." *Id.* at 526. Non-bizarrely shaped districts, including those which are race conscious, do not communicate such concerns. *Id.* at 519. Aleinkoff and Issacharoff reach a similar conclusion in "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*," 92 Mich.L.Rev. 588, 613-14, 644 (1993).

[8] The state's chief demographer, who has drawn hundreds of redistricting plans at the congressional, state, and local levels over the past two decades, candidly acknowledged that she had "never drawn a redistricting plan . . . that didn't take race into account," and that "if taking race into account were

that "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney v. Cummings, supra,* 412 U.S. at 752-53. Legislators "necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way." *Mobile v. Bolden,* 446 U.S. 55, 87 (1980) (Stevens, J., concurring in the judgment). *See UJO, supra,* 430 U.S. at 176 n.4 ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions") (Brennan, J., concurring); *Beer v. United States,* 425 U.S. 130, 144 (1976) ("lawmakers are quite aware that the districts they create will have a white or a black majority; and with each new district comes the unavoidable choice as to the racial composition of the district") (White, J., dissenting); *Davis v. Bandemer,* 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment) (one of the essential purposes of redistricting is to "reconcile the competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups").[9]

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unlawful . . . there is not a redistricting plan in the State of Georgia that would be valid." T.Vol.II,265.

[9] Robert G. Dixon, Jr., a leading scholar of reapportionment, has written: "[W]hether or not nonpopulation factors are expressly taken into account in shaping political districts, they are inevitably everpresent and operative. They influence all election outcomes in all sets of districts. The key concept to grasp is that there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place." "Fair Criteria and Procedure for Establishing Legislative Districts" 7-8, in Representation and Redistricting Issues (Grofman, Lijphart, McKay, & Scarrow eds. 1982).

Because race is inherent in redistricting, *Shaw* repeatedly stressed that it must be the "only" factor driving the process to trigger strict scrutiny. 113 S.Ct. at 2824. *See, e.g., id.* at 2824 (classification "solely on the basis of race"); *id.* at 2825 (action "unexplainable on grounds other than race"); *id.* at 2826 ("anything other than an effort" to segregate voters); *id.* at 2827 ("created solely" on the basis of race); *id.* at 2828 ("cannot be understood as anything other than an effort to separate voters").

To be sure, a minority in a district may always challenge a redistricting plan on statutory or constitutional grounds if its voting strength has been diluted. In such a challenge the plaintiffs would have the burden of proving that the plan was purposefully discriminatory, *Rogers v. Lodge*, 458 U.S. 613 (1982), or had a discriminatory result. *Thornburg v. Gingles, supra*. But that is far different from holding, as did the lower court, that in the absence of proof of a discriminatory purpose or result a plan is unconstitutional simply because race was a factor in redistricting.

In *Thornburg v. Gingles, supra*, 478 U.S. at 50, the Court held that in proving a violation of Section 2, race *must* be taken into account in proposing an alternative redistricting plan to show that a minority could constitute a majority in a single member district. It would be irrational, and would amount to repeal of Section 2, to hold that a plan drawn to comply with *Gingles* was itself an unconstitutional racial gerrymander because it took race

into account in showing that a minority was geographically compact.[10]

A. The Eleventh District Is not Bizarre. District 11 is not bizarre or irrational on its face. Although *Shaw* did not adopt a standard for compactness, one obvious method of determining bizarreness is to compare a challenged district with the district in *Shaw*.[11] Judge Edmondson performed such a test and concluded that "the Eleventh District is not highly irregular, or put differently, bizarre." J.S.App. 99.

The compactness measure applied by Judge Edmondson was not a subjective "know it when I see it" test. He applied an "objective standard," J.S.App. 95 n. 2, based on ascertainable criteria such as the size of the district, the district's miles of borders, the district's outline, whether the district respected existing political boundaries, the percent of the area of the district that came from whole counties, whether the state had a tradition of neat, geometrically shaped districts, whether the district was more irregular than other districts in Georgia or in prior plans or in other states, and whether the district was compact based upon qualitative social science measures.[12] J.S.App. 97-100.

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[10] In Holder v. Hall, 114 S.Ct. 2581, 2588, 2621 n.3, 2627 (1994), a majority of the Court affirmed the continuing validity of its Section 2 jurisprudence.

[11] Justice Souter suggested the appropriateness of such a test in his dissent in *Shaw, supra*. 113 S.Ct. at 2848: "The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal implication of impermissible use of race that the Court finds here."

[12] Other federal courts have used similar comparative analyses. *See* Clark v. Calhoun County, 21 F.3d 92, 95 (5th Cir. 1994)

The Eleventh District has an area of 6,780 square miles. By contrast, Districts One, Two, and Eight each have a total area of over 10,100 square miles. J.S.App. 97. The Second District has 1,243 miles of borders; the Eleventh 1,155. J.S.App. 98. The Ninth District, unlike the Eleventh, crosses the entire state. *Id.* Seventy-one percent of the Eleventh District's boundaries follow existing state, county, and city borders, which is average for the state's other congressional districts. *Id.* Areas in the Second, Third, and Eighth Districts are as, or more, irregular than areas in the Eleventh. *Id.* The Sixth District contains no whole counties. *Id.* at 100. Based on various qualitative measures, the Eleventh District is more compact than 29 to 46 other congressional districts in the country, virtually all of which are majority white. *See, e.g.*, Appendix to Brief of Appellants, State of Louisiana, et al., *Louisiana v. Hays*, No. 94-627. In light of these objective criteria, the

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(approving a proposed district that was "not nearly as bizarre as the district under consideration in *Shaw*"); Cane v. Worcester County, Maryland, 35 F.3d 921, 926-27 n.6 (4th Cir. 1994) (district is not "bizarre" that is "similar in appearance" to former residency districts) pet. for cert. filed, No. 94-995 (Dec. 2, 1994). Still other courts have applied a "functional" rather than a geographic compactness standard that determines whether the shape of the district permits "effective representation." Burton v. Sheheen, 793 F.2d 1329, 1356-57 (D.S.C. 1992), *rev'd on other grounds sub nom.* SRAC v. Theodore, 113 S.Ct. 2954 (1992); Wilson v. Eu, 823 P.2d 545, 552-53 (Cal. 1992). The Eleventh District would meet a functional test of compactness. T.Vol.IV,242-43. There is apparently no generally accepted social science measure of compactness. T.Vol.V,110,124; Grofman, "Criteria for Districting: A Social Science Perspective," 33 U.C.L.A.L.Rev. 77, 85 (1985) ("[t]here are many different ways of applying a compactness requirement but none is generally accepted as definitive").

Eleventh District cannot be deemed to be bizarre in shape.

B. Race Was not the Sole Motivating Factor. Plaintiffs failed to prove that the Eleventh District is explainable only on the grounds of race or skin color. Numerous non-racial factors were taken into account in the district's construction.

The district was drawn to comply with one person, one vote; to be contiguous; to conform where possible to county lines and other political boundaries; to protect incumbents and to avoid contests between incumbents; to accommodate various political interests, economic considerations, and the purely personal preferences of legislators; to include communities of interest, including shared socio-economic interests and values and traditions of residents of the district; and, to comply with the Voting Rights Act. Because the district is not explainable simply on the basis of race, and because non-racial factors were critical in the design of the district, the second prong of *Shaw* was not met.

C. The Absence of Harm. According to *Shaw*, single minded race consciousness in redistricting is a predicate for strict scrutiny because it poses the harm of perpetuating "impermissible racial stereotypes" which may "exacerbate . . . patterns of racial bloc voting" and lead "elected officials . . . to believe that their primary obligation is to represent only the members of that group." 113 S.Ct. at 2827. Given the record in this case of past and continuing discrimination, racial bloc voting, the distinctive socio-economic status of blacks, and the depressed levels of minority political participation, there is no basis for concluding that race conscious redistricting in Georgia is based on racial stereotyping. That blacks have a

great deal in common with one another and share a history of discrimination, as well as many political interests, is not a stereotype; it is a manifest fact.

There is also no basis for contending that the Eleventh District has caused any harm, such as exacerbating patterns of racial bloc voting or depriving anyone of effective representation. The creation of the Eleventh District was a response to, not the cause of, racial bloc voting in the state. In addition, individuals or groups are presumed to be adequately represented by the winning candidate, whether they voted for her or not. As the Court held in *Davis v. Bandemer*, *supra*, 478 U.S. at 132, "[w]e cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters."

The court below found that plaintiffs suffered no harm. J.S.App. 31. In making this finding the court necessarily found, and the witnesses so testified, that there was no evidence that the state's plan exacerbated racial tension, caused segregation, imposed a racial stigma, increased racial bloc voting, or deprived anyone of effective representation. *See* pages 23-4, *supra*.

The Eleventh District is in fact very integrated with a population that is over 34% white (40% non-black VAP). Stip. 37. There are more whites in the district than there are blacks in any of the state's eight majority white districts. Stated differently, all of the state's majority white districts are more "segregated," *i.e.*, composed of residents of the same race, than is District Eleven. The majority black congressional districts in Georgia are the most racially diverse in the state, *id.*; this was true *before and after* the 1992 redistricting. Under the 1981 plan, there were more whites in the majority black Fifth District than

there were blacks in any of the nine majority white districts. Barone and Ujifusa, *supra*, at 280-99.[13]

The finding of the lower court of no harm to voters is consistent with the legislative findings of Congress when it amended and extended the Voting Rights Act in 1982. Critics of the amendment argued that a results standard for Section 2 would limit the political opportunities of minorities by allowing them "to become isolated" in single member districts, *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 511 (1982), would "deepen the tensions, fragmentation and outright resentment among racial groups," *id.* at 662, "would exacerbate, race consciousness," *id.* at 1250, and "may well foster polarization," *id.* at 1328. *See* S.Rep. No. 417, 97th Cong., 2d Sess. 103 (1982) (additional views of Sen. Orrin G. Hatch of Utah).

Congress weighed and rejected these arguments on the ground that there was no evidence to support them, and concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, *supra*, at 31-2. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very

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[13] One commentator has concluded on the basis of a nationwide study of post-1990 congressional redistricting that: "the black districts in the South are not *all-black*, rather they are the most genuinely racially integrated districts in the country, and, the white districts are not *all-white*, and those districts are more racially diverse than much of the U.S." Bositis, Redistricting and Representation: The Creation of Majority-Minority Districts in the South, The Evolving Party System and Some Observations on the New Political Order 28 (Joint Center for Political and Economic Studies, 1995) (forthcoming).

standard which the Committee bill would codify." *Id.* at 32. *See Gingles v. Edmisten*, 590 F.Supp. 345, 356-57 (E.D.N.C. 1984) ("Congress necessarily took into account and rejected as unfounded . . . the risk that creating 'safe' black-majority single member districts would perpetuate racial ghettos and racial polarization in voting behavior"), *aff'd in relevant part sub nom. Thornburg v. Gingles, supra.* As this Court has held, where Congress has assessed and weighed conflicting factors in an area such as voting rights in which it has a specially informed legislative competence, it is not the duty of the Court "to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). There clearly is a basis upon which Congress could determine that majority minority districts were neither stigmatizing nor racially polarizing.

It is the absence of harm that principally distinguishes redistricting cases from those involving the race conscious allocation of scarce employment or contractual opportunities to which strict scrutiny has been held to apply. In *Wygant v. Board of Education*, 476 U.S. 276 (1986), preferential layoffs were subject to strict scrutiny because white teachers with greater seniority were laid off while minority teachers with less seniority were retained. The Court invalidated the layoff/retention scheme because the "burden is too intrusive" on third parties. *Id.* at 283. In *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989), a city's minority set aside was subject to strict scrutiny because it "denies certain citizens the opportunity to compete for a fixed percentage of public contracts." In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Bakke was injured because he was

denied the chance to compete for all the openings in a medical school class. Certain places had been set aside for minority applicants, whom Bakke contended were less qualified than he.

In each of these cases whites were palpably injured or had an independent claim of entitlement – more seniority, acceptable bids for contracts, better qualifications – that was denied by a racial preference. But under a non-dilutive race-conscious redistricting plan, no person is injured or has an independent claim of entitlement.

II. The Eleventh District Would Survive Strict Scrutiny

Even if strict scrutiny were applicable, the Eleventh District would be constitutional. The state had a compelling interest in complying with the Voting Rights Act, and the district is narrowly tailored.[14]

A. The State's Interest Is Compelling. The prior decisions of this Court indicate that a state has a compelling

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[14] Benign race conscious measures mandated by Congress are subject to a less stringent standard of review than those adopted by state and local governments. The former are "constitutionally permissive to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 566 (1990). The state's plan was adopted pursuant to the mandate of Congress under the Voting Rights Act and is substantially related to an important congressional objective, the eradication of the blight of continuing discrimination in voting. South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966). Accordingly, the Eleventh District should be deemed constitutional without resort to more heightened analysis.

interest in taking race into account in complying with the Section 5 objections of the Attorney General. *See City of Richmond v. J.A. Croson, Co., supra,* 488 U.S. at 497 (race conscious state action is justified to remedy "judicial, legislative, or administrative findings of constitutional or statutory violations"); *Metro Broadcasting, Inc. v. F.C.C., supra,* 497 U.S. 584 ("a State subject to § 5 of the Voting Rights Act . . . may 'deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5' "); *Fullilove v. Klutznick,* 448 U.S. 448, 483 (1980) ("a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation"); *UJO, supra,* 430 U.S. at 164-65.

The court below acknowledged "a putatively compelling interest behind the drafting of the current Eleventh Congressional District," but held the interest failed because the Attorney General's objections to the prior plans were "improper." J.S.App. 63-4. Aside from the error in judicially reviewing the Section 5 determination of the Attorney General,[15] this Court's decisions do not require a showing of an actual violation in order for a state to take remedial action.

A state may act where it has a reasonable or "firm" basis for believing that remedial measures are necessary.

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[15] *See* Section III *infra.* In a *de novo* Section 5 declaratory judgment action the District of Columbia court would have the power to grant preclearance despite the Attorney General's objection. Beer v. United States, *supra,* 425 U.S. at 136. A local three judge court would similarly have the power to determine coverage under Section 5 independent of the Attorney General. Presley v. Etowah County Commission, 112 S.Ct. 820, 831 (1992). That does not mean, however, that a state does not have a compelling interest in complying with a Section 5 objection or that a local district court is authorized to review that objection.

Wygant v. Board of Education, supra, 476 U.S. at 277, 286; *City of Richmond v. J.A. Croson, Co., supra,* 488 U.S. at 500 (a state need only show a "strong basis in evidence for its conclusion that remedial action was necessary"). The Attorney General's objection furnishes the requisite strong basis in evidence for the state's remedial plan.

A state should not be required to challenge the Attorney General's Section 5 objection in the District of Columbia court before it could conclude that it had a compelling interest in adopting a remedial plan. *Shaw v. Hunt,* 861 F.Supp. 408, 443 & n.34 (E.D.N.C. 1994). Such a requirement would denigrate the judgment of the Attorney General who was authorized by Congress to make Section 5 determinations, would be contrary to the policy of encouraging voluntary compliance with federal civil rights laws, and would encourage needless litigation, something the Voting Rights Act was expressly designed to pretermit. *South Carolina v. Katzenbach, supra,* 383 U.S. at 335.

Georgia also had a strong basis in evidence for believing that its first two plans would expose the state to liability under the preconditions for a Section 2 violation set out in *Thornburg v. Gingles, supra,* 478 U.S. at 50-1. The state has a long history of discrimination, including intentional discrimination in congressional redistricting. Voting is racially polarized to such an extent that unless African American voters constitute a majority in a district their candidates of choice will usually be defeated. Various plans introduced during the redistricting process showed that the black population is sufficiently compact so as to constitute a majority in three districts. Under the circumstances, the state had a compelling interest in complying with Section 2.

B. The Eleventh District Is Narrowly Tailored. *Shaw* did not define "narrow tailoring" except to indicate that a plan would not be narrowly tailored that "went beyond what was reasonably necessary to avoid retrogression." 113 S.Ct. at 2831. The Attorney General's objection in this case was based upon the purpose, not the retrogression or effect, standard of Section 5. *City of Rome v. United States*, 446 U.S. 156, 172 (1980) ("Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent"). Accordingly, whether the plan was narrowly tailored to avoid retrogression is not an issue in this appeal.

In other contexts, in determining if an affirmative action plan were narrowly tailored, the Court has looked at such factors as: (1) the existence of alternative remedies; (2) whether the plan is a rigid "quota" or a flexible "goal;" (3) the duration of the plan; (4) the pool of individuals to be benefitted by the plan; and (5) the effect of the plan on third parties. *See, United States v. Paradise*, 480 U.S. 149, 171-85 (1987); *Wygant v. Board of Education, supra*, 476 U.S. at 279-84. As to the first factor, there is no completely race neutral alternative means of accomplishing the goal of complying with the Voting Rights Act. In addition, the state did not make more use of race than was necessary, *i.e.*, it did not create more majority black districts than was reasonably necessary to comply with the act, nor is the black population in the majority black districts larger than was reasonably necessary to provide blacks an equal opportunity to elect candidates of their choice.

As to the second factor, majority black districts are not a rigid racial quota. They do not prohibit non-minorities from running for office nor do they guarantee the election of minorities. *See Johnson v. De Grandy*, 114

S.Ct. 2647, 2665 (1994) (Kennedy, J., concurring in part and concurring in the judgment) ("[t]he assumption that majority-minority districts elect only minority representatives . . . is false as an empirical matter").

As to the third factor, a congressional redistricting plan is by its very nature temporary. It will only last until the next decennial census, at which time a new plan will have to be drawn to account for changes in population and possible changes in the allocation of congressional seats. *See Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

As to the fourth factor, the percentage of majority black districts does not exceed the percentage of blacks in the state as a whole. *See Johnson v. De Grandy, supra*, 114 S.Ct. at 2658 and n.11 (noting that equality of political opportunity is to be judged by comparing the number of majority-minority districts with the number of minorities in the relevant population). As to the fifth factor, the state's redistricting plan does not harm third parties by diluting their voting strength, either by failing to comply with one person, one vote or the non-discrimination provisions of the Voting Rights Act. Even if Georgia's congressional redistricting plan were subject to strict scrutiny it would be narrowly tailored to promote a compelling state interest.

III. The Court Below Erred in Judicially Reviewing the Section 5 Objection of the Attorney General

The court below erred in reviewing the Attorney General's objection under Section 5, and holding it to be "improper." J.S.App. 63. This Court has consistently held that the merits of a Section 5 determination are not reviewable by a local three judge court. *Perkins v.*

Matthews, 400 U.S. 379, 385 (1971) ("Congress expressly reserved [Section 5 determinations] for consideration by the District Court for the District of Columbia or the Attorney General"); *Morris v. Gressette*, 432 U.S. 491, 507 n.24 (1977) ("Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act" under Section 5). *Accord, Harris v. Bell*, 562 F.2d 772, 774 (D.C.Cir. 1977). Judicial review of proposed changes in voting is available, but only in the District Court for the District of Columbia. *Allen v. State Board of Elections*, 393 U.S. 544, 555-56 & n.19 (1969); *United States v. Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 647 (1977).

This Court approved the venue provisions of Section 5 as an appropriate exercise of congressional authority pursuant to Article III, Section I of the Constitution. *South Carolina v. Katzenbach, supra*, 383 U.S. at 331-32. Congress in the 1970, 1975, and 1982 amendments of the Voting Rights Act continued to vest the District of Columbia courts and the Attorney General with exclusive jurisdiction to determine the merits of Section 5 submissions on the grounds that it was necessary to provide uniform interpretation and application of the act's standards and to continue to insure decision-making free from local pressures. *McDaniel v. Sanchez*, 452 U.S. 130, 151 (1981) ("centralized review enhances the likelihood that recurring problems will be resolved in a consistent and expeditious way").

The effect of the decision below is essentially to destroy the centralized Section 5 review process established by Congress. In addition, the decision is a prescription for the multiplication of litigation. Disgruntled citizens would be encouraged to challenge remedies for

Section 5 violations in hopes that a local court would find the Attorney General's objection improper and allow some variant of a pre-existing discriminatory practice to be implemented. Covered jurisdictions, knowing that a local determination was possible, would have no incentive voluntarily to submit their proposed voting changes for Section 5 preclearance.

The majority's review of the Section 5 process was egregious for other reasons. First, it essentially ignored the purpose prong of Section 5, which was the basis of the Attorney General's objection. J.S.App. 68. Second, its criticism of so-called "partisan 'informants'," "secret agents," and the ACLU is basically an áttack upon the Department of Justice for making a factual investigation of the state's submissions. It is difficult to conceive how Section 5 decisionmaking could be reliable if the Attorney General were permitted to receive information only from the submitting jurisdiction and were barred from communicating with racial minorities and their representatives potentially affected by proposed voting changes.

IV. Plaintiffs Lack Standing

As the court below found, plaintiffs failed to show that they or any other group were harmed by the configuration of the Eleventh District. J.S.App. 31. In the absence of harm, plaintiffs have no basis to complain of Georgia's congressional redistricting. In *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), the Court identified three elements as constituting "the irreducible constitutional minimum of standing:"

> First, the plaintiff must have suffered an 'injury in fact' . . . which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or hypothetical,' . . . Second . . . the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant . . . Third, it must be 'likely,' as opposed to merely ' speculative,' that the injury will be 'redressed by a favorable decision.'

Id. (citations omitted). *Accord, Allen v. Wright*, 468 U.S. 737, 754 (1984) ("stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race" is insufficient harm to confer standing); *Diamond v. Charles*, 476 U.S. 54, 66 (1986); *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

The requirements of standing "are not mere pleading requirements but rather [are] an indispensable part of the plaintiff's case." *Lujan, supra*, 112 S.Ct. at 2136. Plaintiffs did not meet their burden of proof. Consequently, the district court erred in deciding the plaintiffs' claims.

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
DUBLIN DIVISION

CONCERNED CITIZENS COMMITTEE OF DUBLIN AND LAURENS COUNTY, ET AL., Plaintiffs vs. LAURENS COUNTY, GEORGIA, ET AL., Defendants	CIVIL ACTION NO. CV392-033 (Filed Sep. 8, 1994)

ORDER

Course of Proceedings: Plaintiffs initiated this action on July 20, 1992, under the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and prayed for declaratory and injunctive relief concerning the method of electing the members of the Laurens County Board of Commissioners. In their complaint Plaintiffs alleged that the voting districts in effect for the Board of Commissioners contained substantially unequal populations in violation of the one person-one vote requirement of the Fourteenth Amendment.

2.

By its order of July 20, 1992, this Court denied Plaintiffs' motion for temporary restraining order and preliminary injunction against the holding of the July 21, 1992, primary election for the five (5) positions on the Board of

Commissioners on timeliness grounds. *See Concerned Citizens Committee of Dublin and Laurens County v. Laurens County, Georgia*, Civ. No. CV392-033 (S.D.Ga. July 20, 1992).

3.

By its order of October 27, 1992, this Court denied Plaintiffs' motion for temporary restraining order and preliminary injunction against the holding of the November 3, 1992, general election for the five (5) positions on the Board of Commissioners. In doing so this Court noted that,

> The denial of Plaintiffs' motion does not, however, reflect upon the merit of Plaintiffs' case. The permission to proceed with the November 3, 1992, general election is subject, therefore, to the proviso that the terms of office for candidates elected to the Laurens County Board of Commissioners under the existing district voting plans may, if necessary, be foreshortened by future order of this Court as part of a remedy in this case.

Id., Order of October 27, 1992, p. 2.

4.

By its order of July 13, 1994, this Court denied Plaintiffs' motion for temporary restraining order and preliminary injunction against the holding of a special election on July 19, 1994, to fill a vacancy on the Board of Commissioners from District No. 4 on grounds that the public interest " . . . is disserved when . . . inhabitants, have *no*

voice or representative in local county government. . . . *Id.*, Order of July 13, 1994, p. 3. In doing so this Court stated that,

> . . . it would appear that an election to Commission for District 4 is an interim and, probably, short term position. There should be no expectation of permanence of a full term. Indeed, the term will more likely be months than years.

Id., at p. 4.

5.

The Constitutional Violation: According to the 1990 Census of Population, the existing five (5) voting districts used in the election of the Board of Commissioners are as follows:

District Number	Total Population	Percent of Population Deviation from Ideal District
1	6,763	-15.44%
2	7,642	- 4.45%
3	7,748	- 3.13%
4	8,805	+10.09%
5	9,024	+12.83%

Total Range of Deviation = 28.27%

(Complaint, para. 12)

6.

The decisions of the Supreme Court of the United States establish that an apportionment plan with a maximum population deviation over 10% creates a prima facie case of denial of equal protection, and that such a showing shifts the burden to government officials to justify, if they can, the population inequality. *See Swann v. Adams*, 385 U.S. 440, 444 (1967); and *Brown v. Thomson*, 462 U.S. 835, 103 S.Ct. 2690 (1983). The total range of population deviation here (28.27%) easily satisfies this prima facie requirement. Defendants have offered no justification " . . . incident to the effectuation of a rational state policy;" *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), for this substantial deviation. Instead, it appears that the reason that said population inequality presently exists is that the Georgia General Assembly failed to enact reapportionment legislation during its 1992, 1993 and 1994 Sessions.

7.

Accordingly, IT IS HEREBY ADJUDGED AND DECREED that the present plan used in the election of the Board of Commissioners is violative of the Fourteenth Amendment of the Constitution of the United States, and Defendants and those acting in concert with them are ENJOINED from further enforcement of said voting plan.

A hearing was conducted with respect to the obviously necessary redistricting of the county, and the parties' various submissions with respect to redistricting, on July 26, 1994, beginning at approximately 5:10 p.m. and concluding at approximately 9:00 p.m.

The hearing was a free-range exchange of information not limited to the taking of conventional evidence and testimony in such matters. This was necessitated and facilitated by virtue of the presence of the employees of the State Reapportionment Office, Ms. Linda Meggers and Ms. Penny Williams, both of whom have made an admirable contribution to the Court and to the citizens of Laurens County in their constancy to purpose and indefatigable patience. For approximately three (3) hours we drew one (1) plan after another, and their good nature was never in question.

No great deal of time was spent on the need for redistricting in Laurens County. The Court had become completely familiar with the file, the various contentions of the parties through earlier hearings and through action upon the Plaintiffs' Motion for Preliminary and Temporary Injunctive Relief; the last such order having been entered on July 13, 1994.

The plain facts of the case, barring any consideration of the Section 2 contentions of the parties that the votes of black citizens were unconstitutionally and illegally diluted in the heretofore existing scheme of districting in Laurens County, were that the scheme of districting was already, and in all ways, violative of the constitutional and precedental interpretative rules which require an individual proportionality in voting – that is, one man/one vote.

This Court obviously has jurisdiction. It is uncontested that jurisdiction is grounded not only in the Voting Rights Act but also in Title 28, United States Code. Further notice of jurisdiction is unnecessary.

The parties were represented by counsel at hearing, and while the parties seem to be cordially in a consensus and agreement at the close of our session, this plan for the redistricting of Laurens County and this order implementing same is, in all respects, a court-ordered plan. It does not come from the legislative enactment of Laurens County nor from any proposal by the Plaintiffs, but from an assimilation of those and from the Court's independent consideration of those submissions and the facts of the case as they lie upon land and in the residences of Laurens County.

Laurens County is one of Georgia's 159. It is a county which has both agricultural roots and urban aspects. The City of Dublin is the focus of Laurens County, and it is somewhere near the center of Laurens County. There are other burroughs [sic] in the county, most notably Dudley and Rentz and Montrose, but the only urban area is Dublin, and of course, East Dublin, which I believe is a separate municipality.

The Court's plan is depicted upon the attached computer graphic map prepared by the Reapportionment Services' Office of the Georgia General Assembly, as contracted with the University of Georgia.

A partial statement of the Court's findings of fact and conclusions of law, and the establishment of the plan were made in open court on July 27, 1994; the parties being absent by their own choice.

The districts as planned by the Court are under the circumstances relatively compact. They are mixed in all respects of an urban and an agricultural interest. The least urban, which is perhaps the most industrial, and one

of the greater commercial interest but predominantly agricultural is District Number Two. District Four is the district that occurs on both sides of the river, and that initially troubled me, but on balance now it does not. District Four includes a portion of the City of Dublin and a portion of the City of East Dublin, and is made contiguous for ready access by foot or automobile by the river bridge that joins the cities of East Dublin and Dublin.

Under the circumstances and with the obligation that I felt to construct two majority-minority districts, the contiguity of District Four is sufficient for purposes of a county commission district.

I have the same concerns and reservations that I have heretofore expressed about our penchant in the Federal Judiciary for the use of one remedy exclusively in Section 2 cases – that is, the creation of single-member majority districts for minorities – I have expressed those previously in several orders, particularly the 1989 order regarding the City of Warrenton, Georgia. Those same concerns and observations are incorporated by such reference herein. However, that form of remedy was in vogue at the time of the filing of this lawsuit, still is, and despite those reservations that I hold does appear to satisfy the needs of Laurens County. It appears to me that any other form would be such a novel and innovative concept in the case of Laurens County and so opposed to the sensitivities and traditions of the people that I will not engage in any excursion outside the conventional remedy of the creation of such districts.

8.

Remedy: In order to remedy this constitutional violation, this Court ORDERS into effect the five (5) single member district plan which is described by census tracts in Exhibit "A" hereto and made a part hereof and which are shown and delineated on Exhibit "B" hereto and made a part thereof. This reapportionment plan will remain in effect until altered by the further order of this Court or until an alternate voting plan for the Board of Commissioners is enacted, pursuant to Georgia law, and precleared pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c.

9.

At the time of the regularly scheduled general election on November 8, 1994, the five (5) members of the Board of Commissioners shall be elected in a special nonpartisan election, and the voting plan set forth in paragraph 8, *supra*, shall be used in said election.

10.

Defendant Superintendent of Elections Harper shall mark five (5) like pieces of paper District No. 1, District No. 2, District No. 3, District No. 4, and District No. 5, respectively, and place them in a container. At a practicable time to be previously announced in the legal organ of Laurens County, Defendant Harper shall randomly draw two (2) pieces of paper from said container. Said drawing shall be conducted in the office of Judge of the Probate Court of Laurens County, and all interested residents of

the county, including, but not limited to, Plaintiffs and Defendants, shall be allowed to attend and observe said drawing.

11.

The terms for the two (2) voting districts which correspond with the two (2) pieces of paper first randomly drawn by Defendant Harper shall be open for a term of two (2) years at the November 8, 1994, special election, so that their terms will commence on January 1, 1995, and run through December 31, 1996. At the time of the regularly scheduled general election in November 1996, the terms for these two (2) positions on the County Commission will be open for a term of four (4) years and will continue on that basis unless changed by order of this Court or by an act of the Georgia General Assembly. The terms for the three (3) voting districts which do not correspond with the two (2) pieces of paper randomly drawn by Defendant Harper shall be open for a term of four (4) years at the November 8, 1994, special election, so that their terms will commence on January 1, 1995, and run through December 31, 1998, and will continue on that basis unless changed by order of this Court or by an act of the Georgia General Assembly.

12.

The period for candidate qualification for all five (5) positions on the Board of Commissioners for the November 8, 1994, special non-partisan election shall open at 9:00 a.m. on Monday, September 12, 1994, and shall

remain open until 12:00 noon on Friday, September 16, 1994.

13.

In the event a run-off election is required, pursuant to *O.C.G.A.* Section 21-2-501, for any position on the Board of Commissioners elected in 1994, that run-off election shall be held on Tuesday, November 22, 1994.

14.

The members of the Board of Commissioners elected from each voting district shall be required to reside within the district from which they are elected and each member shall be nominated or elected in any future election, whether it be primary, run-off, special or general, solely by the voters who reside in the respective voting districts.

15.

That except as they conflict with provisions of this order, the laws of the State of Georgia shall continue to govern elections for positions on the Board of Commissioners, and the laws of the State shall continue to govern and prescribe the powers and duties of those officials.

16.

That the matter of Plaintiffs' entitlement to costs and attorney's fees and the amount thereof shall be submitted

on motion at a later date in the event the parties are not able to reach agreement on this matter.

SO ORDERED, this 8th day of September, 1994.

/s/ Dudley H. Bowen, Jr.
UNITED STATES
DISTRICT JUDGE